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Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor v Ang Ming Lee & Ors and other appeals

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-01(A)-80–03 OF 2017, W-01(A)-81–03 OF 2017, W-01(A)-86–03 OF 2017, W-01(A)-400–03 OF 2017 AND W-01(A)-451–03 OF 2017
DAVID WONG, HASNAH HASHIM AND HARMINDAR SINGH JJCA
22 MAY 2018

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Contract — Housing development contract — Whether reg 11(3) of the Regulations which gave the Controller of Housing power to waive or modify any provision in sale and purchase agreement ('SPA') between developer and buyer in special circumstances was ultra vires the Act — Whether power of the Minister concerned under the Act to make such waiver or modification to the SPA was delegable to and exercisable by the Controller pursuant to reg 11(3) — Whether buyers always had to be given opportunity to be heard before decision was made by the Minister or Controller on any application by developer to vary terms of SPA failing which such decision could be rendered invalid — Housing Development (Control and Licensing) Act 1966 — Housing Development (Control and Licensing) Regulations 1989 reg 11(3)

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Buyers of units in a new condominium block applied to the High Court by way of judicial review to quash the decision of the Controller of Housing ('the Controller') under the Ministry of Urban Wellbeing, Housing and Local Government to allow an application by the developer to extend by 12 months the time period within which it was to deliver vacant possession of the units to the buyers as stipulated under their sale and purchase agreements ('SPAs'). Alternatively, the buyers sought to declare the Controller's said decision as invalid for being ultra vires the Housing Development (Control and Licensing) Act 1966 ('the Act'). A further declaration was sought that reg 11(3) of the Housing Development (Control and Licensing) Regulations 1989 ('the Regulations') — which gave the Controller power to waive or modify any provision in the SPAs in special circumstances — was ultra vires the Act. The buyers' complaint was that the Controller's decision to grant the developer an extension of time to complete the project extinguished their claims for damages against the developer for late delivery of vacant possession. The Controller had rejected the developer's first application under reg 11 for extension of time to complete the project. Exercising its right of appeal under reg 12, the developer appealed against the decision to the Minister concerned. The appeal was allowed but the letter granting the extension of time did not appear to have been made by, or on behalf of, the Minister but was signed by an officer on behalf of the Controller. The High Court allowed the judicial review applications on the ground reg 11(3) of the Regulations was ultra vires the Act

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and that the Controller therefore had no power to waive or modify the terms of the SPAs between the buyers and the developer. Inter alia, the High Court held that under the Act the power given to the Minister to regulate and modify the terms of the SPAs had to be exercised by the Minister himself and he could not delegate that power to the Controller. The instant appeal was against the High Court's decision.

Held, allowing the appeals, setting aside the declaration that reg 11(3) was ultra vires the Act but affirming the High Court's decision that the Controller's decision to approve the developer's application for extension of time to complete the project was null and void albeit on different grounds:

(1) Regulation 11(3) was not ultra vires the Act as it was a provision designed to regulate and control the terms of the SPAs as envisaged by s 24(2)(e) of the Act. The argument that only the Minister had the power to modify or waive the statutory form contract was without merit as s 4 of the Act provided that the Controller might exercise any of the powers by or under the Act. It followed that the Controller had the power to exercise his discretion as granted under reg 11(3). In this context, it was noteworthy that the SPAs and the terms contained therein were derived from the form prescribed in Schedule H which was to be found in the Regulations and not in the Act. It could therefore be reasonably inferred that the power granted to the Minister was intended to be delegable (see paras 17–18).

(2) The letter of 17 November 2015 (approving the developer's appeal for extension of time) was signed on behalf of the Controller. There was no indication from the face of the letter that the decision was conveyed on behalf of the Minister or that the signatory of the letter was acting on the Minister's authority. The letter stated that it was the Ministry which had taken the decision. To muddy the waters further, the letter indicated that the decision was made pursuant to reg 11 instead of reg 12. The impression gained from considering the whole of the letter was that the appeal from the decision of the Controller was decided by the Controller himself and that was wholly untenable. Since the Minister did not file any affidavit to provide some clarity, the contention that the Minister was not the one who had made the decision had merit and could not be dismissed lightly. Therefore, the order as contained in the letter of 17 November 2015 was made without jurisdiction. It was ultra vires the Act and therefore a nullity and of no effect (see paras 21–23).

(3) The decision made in this case, whether by the Controller or the Minister, was null and void and of no effect and had to be set aside since the purchasers were not given an opportunity to be heard before the decision was made. The purpose of the Act was to protect the interest of purchasers. They should have been notified of the developer's application

A for any extension of time to complete the project and been given a reasonable period of time to state their views before any decision was made since their right to claim damages in the event of delay would be adversely affected or even extinguished (see paras 24–25).

B **[Bahasa Malaysia summary**

Pembeli-pembeli unit blok pangsapuri baru memohon kepada Mahkamah Tinggi melalui semakan kehakiman untuk membatalkan keputusan Pengawal Perumahan ('Pengawal') di bawah Kementerian Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan untuk membenarkan permohonan oleh C pemaju untuk melanjutkan 12 bulan tempoh masa dalam mana yang ia perlu menyerahkan milikan kosong unit-unit kepada pembeli-pembeli seperti yang ditetapkan di bawah perjanjian jual beli mereka ('PJB'). Secara alternatif, pembeli-pembeli memohon untuk mengisytiharkan keputusan Pengawal D tersebut sebagai tak sah kerana ultra vires Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 ('Akta'). Pengisytiharan selanjutnya dipohon bahawa peraturan 11(3) Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989 ('Peraturan-Peraturan') — yang memberi kuasa kepada Pengawal untuk mengenepikan atau mengubahsuai apa-apa peruntukan di E dalam PJB dalam keadaan khas — adalah ultra vires Akta. Aduan pembeli-pembeli adalah bahawa keputusan Pengawal untuk memberikan pemaju pelanjutan masa untuk menyiapkan projek membatalkan tuntutan mereka bagi ganti rugi terhadap pemaju bagi penyerahan lewat milikan kosong. Pengawal telah menolak permohon pertama pemaju di bawah F peraturan 11 bagi pelanjutan masa untuk menyiapkan projek tersebut. Melaksanakan hak rayuannya di bawah peraturan 12, pemaju merayu terhadap keputusan Menteri berkenaan. Rayuan dibenarkan tetapi surat yang memberikan pelanjutan masa nampaknya tidak dibuat oleh, atau bagi pihak Menteri tetapi ditandatangani oleh pegawai bagi pihak Pengawal. Mahkamah G Tinggi membenarkan permohonan semakan kehakiman atas alasan peraturan 11(3) Peraturan-Peraturan adalah ultra vires Akta dan bahawa Pengawal oleh itu tidak mempunyai kuasa untuk mengenepikan atau mengubahsuai terma-terma PJB di antara pembeli-pembeli dan pemaju. Antara lain, Mahkamah Tinggi memutuskan bahawa di bawah Akta kuasa H diberikan kepada Menteri untuk mengawal dan mengubahsuai terma-terma PJB hendaklah dilaksanakan oleh Menteri sendiri dan beliau tidak boleh menugaskan kuasa tersebut kepada Pengawal. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi.

I **Diputuskan**, membenarkan rayuan-rayuan, mengetepikan pengisytiharan bahawa peraturan 11(3) ultra vires Akta tetapi mengesahkan keputusan Mahkamah Tinggi bahawa keputusan Pengawal untuk meluluskan permohonan pemaju bagi pelanjutan masa untuk menyiapkan projek adalah tak sah dan batal meskipun atas alasan berlainan:

(1) Peraturan 11(3) tidak ultra vires Akta kerana ia adalah peruntukan yang digubal untuk mengatur dan mengawal terma-terma PJB seperti yang ditetapkan oleh s 24(2)(e) Akta. Hujahan bahawa hanya Menteri mempunyai kuasa untuk mengubahsuai atau mengenepikan bentuk kontrak statutori adalah tanpa merit memandangkan s 4 Akta memperuntukkan bahawa Pengawal mungkin melaksanakan mana-mana kuasa oleh atau di bawah Akta. Oleh itu Pengawal mempunyai kuasa untuk melaksanakan budi bicaranya seperti yang diberikan di bawah peraturan 11(3). Dalam konteks ini, adalah patut diberi perhatian bahawa PJB dan terma-terma yang terkandung di dalamnya adalah berpunca daripada bentuk yang dinyatakan di dalam Jadual H yang mana didapati di dalam Peraturan-Peraturan dan bukan di dalam Akta. Oleh itu adalah munasabah untuk membuat kesimpulan bahawa kuasa yang diberikan kepada Menteri adalah diniatkan untuk boleh ditugaskan (lihat perenggan 17–18).

(2) Surat bertarikh 17 November 2015 (yang meluluskan rayuan pemaju bagi pelanjutan masa) ditandatangani bagi pihak Pengawal. Tidak terdapat tanda daripada surat tersebut bahawa keputusan diberikan bagi pihak Menteri atau bahawa penandatangan surat bertindak atas kuasa Menteri. Surat menyatakan bahawa ia adalah kementerian yang membuat keputusan tersebut. Mengerohkan keadaan lagi, surat menunjukkan bahawa keputusan dibuat berikutan peraturan 11 bukan peraturan 12. Kesan diperolehi daripada mempertimbangkan keseluruhan surat adalah bahawa rayuan daripada keputusan Pengawal diputuskan oleh Pengawal sendiri dan tak boleh dipertahankan secara keseluruhan. Memandangkan Menteri tidak memfailkan apa-apa afidavit untuk memberikan penjelasan, hujahan bahawa Menteri bukan orang yang membuat keputusan mempunyai merit dan boleh ditolak dengan mudah. Oleh itu, perintah seperti yang terdapat dalam surat 17 November 2015 adalah dibuat tanpa bidang kuasa. Ia adalah ultra vires Akta dan oleh itu tak sah dan tidak mempunyai kesan (lihat perenggan 21–23).

(3) Keputusan yang dibuat dalam kes ini, sama ada Pengawal atau Menteri, adalah tak sah dan batal dan tidak berkesan dan perlu diketepikan memandangkan pembeli-pembeli tidak diberikan peluang untuk didengar sebelum keputusan dibuat. Tujuan Akta adalah untuk melindungi pembeli-pembeli. Mereka patut diberitahu mengenai permohonan pemaju untuk apa-apa pelanjutan masa untuk menyiapkan projek dan diberikan tempoh masa yang munasabah untuk menyatakan pandangan mereka sebelum apa-apa keputusan dibuat memandangkan hak mereka untuk menuntut ganti rugi sekiranya terdapat kelewatan akan terjejas secara bertentangan ataupun terbatal (lihat perenggan 24–25).]

Notes

For cases on housing development contract in general, see 3(3) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 6031–6032.

Cases referred to

Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor [2018] 2 MLJ 590; [2017] 4 CLJ 265, FC (refd)

Ketua Pengarah Kastam v Ho Kwan Seng [1977] 2 MLJ 152, FC (refd)

Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)

Legislation referred to

Housing Development (Control and Licensing) Act 1966 ss 4, 4(1), (2), 24, 24(2)(c), (2)(e), Form H

Housing Development (Control and Licensing) Regulations 1989 regs 11, 11(3), 12, Schedule H

Appeal from: Judicial Review Application Nos WA-25–124–07 of 2016, WA-25–125–07 of 2016 and WA-25–126–07 of 2016 (High Court, Kuala Lumpur)

Khairul Nizam bin Mohd Kamal (Senior Federal Counsel, Attorney General's Chambers) in Civil Appeal Nos W-01(A)-80–03 of 2017, W-01(A)-81–03 of 2017 and W-01(A)-86–03 of 2017 for the appellants.

George Varughese (Johan Mohd Abdullah and Azhana Mohd Khairudin with him) (Johan Arafat Hamzah & Mona) in Civil Appeal Nos W-01(A)-400–03 of 2017 and W-01(A)-451–03 of 2017 for the appellants.

KL Wong (Albert Soo, Viola De Cruz, Andrew Chan and Koh Kean Kang with him) (KL Wong) in Civil Appeal Nos W-01(A)-80–03 of 2017, W-01(A)-86–03 of 2017, W-01(A)-400–03 of 2017 and W-01(A)-451–03 of 2017 for the respondents.

Audrey Lim (Shui-Tai) in Civil Appeal No W-01(A)-81–03 of 2017 for the respondent.

Nicholas Chang (Elison Wong with him) watching brief for the Bar Council.

Pretam Singh Darshan Singh (Amarpeet Kaur Randhawa with him) watching brief for Real Estate and Housing Developers' Association Malaysia.

Harmindar Singh JCA (delivering judgment of the court):

[1] There are five appeals before us. They arise from a decision of the Kuala Lumpur High Court delivered on 27 February 2017. The High Court had allowed the applications for judicial review by three sets of applicants in three separate applications for judicial review which were heard together.

[2] The applicants in each case were purchasers of apartment units in a project known as Sri Istana Condominium. They ('purchasers') brought judicial review applications against the Minister for Urban Wellbeing, Housing and Local Government ('the Minister'), the Controller of Housing of the same Ministry ('the controller'), BHL Construction Sdn Bhd, the developer, and in one application, the Ministry for Urban Wellbeing, Housing and Local Government.

[3] The applicants had sought an order to quash the decision of the controller, which decision, by a letter dated 17 November 2015, amended the time period for delivery of vacant possession from 36 months to 48 months in respect of the of sale and purchase agreement entered into between the purchasers and the developer.

[4] Alternatively, they sought a declaration that the letter of 17 November 2015 was invalid as being beyond the jurisdiction stipulated in the Housing Development (Control and Licensing) Act 1966 ('the Act'). They also sought a declaration that reg 11(3) of the Housing Development (Control and Licensing) Regulations 1989 ('the Regulations 1989') is ultra vires the Act.

[5] In essence, the High Court granted the judicial review application on the main basis that reg 11(3) was ultra vires the Act and that the Controller of Housing had no power to waive or modify the contract of sale between the purchasers and the developer.

[6] Aggrieved with this decision, the respondents in the High Court have now appealed to this court. We heard arguments on 12 March 2018 and indicated that due to the urgency of the appeal, we would deliver a decision in two weeks. On 30 March 2018, we delivered our unanimous decision giving broad reasons as to how we had arrived at our conclusions. We indicated to the parties that a full written judgment will be prepared in due course. This is now the judgment of the court.

BACKGROUND FACTS

[7] BHL Construction Sdn Bhd, one of the appellants here ('the developer'), is the developer of a project to build a condominium known as the Palace Court @ Kuchai Lama ('Sri Istana Condo'). The respondents are purchasers of individual condominium units ('the units') in the said project. The sale and purchase agreement ('SPA') between the developer and the purchasers stipulate that the time period for delivery of vacant possession of the units shall be 36 months from the date of signing of the respectively SPAs.

[8] The developer had filed an application for an extension of time for

delivery of vacant possession of the units to the Controller of Housing vide letter dated 20 October 2014 pursuant to reg 11 of the Regulations 1989. The said application for extension of time was not approved by the controller and the same was communicated to the developer vide letter dated 24 October 2014.

[9] Subsequently, exercising the right afforded under reg 12 of the Regulations 1989, the developer lodged an appeal to the Minister vide letter dated 28 October 2014, listing therein the reasons for the delay in completing the project within the stipulated period in the SPAs. The developer's said appeal for extension of time for the delivery of vacant possession for the said units was approved purportedly by the Minister vide letter dated 17 November 2015 granting an extension of 12 months. We say purportedly, and as we shall see, it was asserted that it was not the decision of the Minister.

[10] Now, there was no dispute that there was a delay in the completion of the project and that the developer became liable to pay damages to the purchasers. The decision by the Minister extinguished their right to claim damages. Aggrieved with this decision, the purchasers filed applications for judicial review at the Kuala Lumpur High Court. They were successful. The decision as stated in the impugned letter of 17 November 2015 was quashed as it was declared to be ultra vires the Act. Hence the appeals before us.

ISSUES BEFORE US

[11] Before us, the parties had raised several issues for our consideration and decision. The issues which we judged merited consideration were the following:

(a) whether reg 11(3) of the Housing Development (Control and Licensing) Regulations 1989 ('the Regulations 1989') is ultra vires the Housing Development (Control and Licensing) Act 1966 ('the Act');

(b) whether the letter of 17 November 2015, in which an extension of 12 months was granted to complete the project, was made without jurisdiction and is therefore invalid and of no effect; and

(c) whether the purchasers ought to have been given a right of hearing prior to the decision made by the controller and/or Minister granting the developer an extension of time to complete the project.

WHETHER REG 11(3) IS ULTRA VIRES THE ACT

[12] The first issue is whether reg 11(3) is ultra vires the Act. Regulation 11(3) states as follows:

(3) Where the Controller is satisfied that owing to special circumstances or hardship or necessity compliance with any of the provisions in the contract of sale is impracticable or unnecessary, he may, by a certificate in writing, waive or modify such provisions:

Provided that no such waiver or modification shall be approved if such application is made after the expiry of the time stipulated for the handing over of vacant possession under the contract of sale or after the validity of any extension of time, if any, granted by the Controller.

[13] Now, under the Act itself, there are various provisions which set out the powers of the Minister and the appointment of the Controller of Housing. Section 4(1) of the Act provides that the Minister may appoint a Controller of Housing and any such number of Deputy Controllers, Inspectors of Housing and other officers and servants as the Minister may deem fit to appoint from amongst members of the public service. Section 4(2) of the Act provides that the Controller and the Deputy Controllers shall have and may exercise any of the powers on an Inspector by or under this Act.

[14] In order to achieve the aim of the Act, the Minister, by virtue of s 24 of the Act, has the power to make regulations for the carrying into effect the provisions of the Act. In particular, the Minister has the power under s 24(2)(c) to prescribe the form or forms of contracts which shall be used by a licensed housing developer, his agent, nominee or purchaser both as a condition of the grant of licence under this Act or otherwise.

[15] Importantly, by virtue of s 24(2)(e) of the Act, the Minister also has the power to make regulations to 'regulate and prohibit the conditions and terms of any contract between a licensed housing developer, his agent or nominee and his purchaser'.

[16] Now, the learned judge took the view that s 24 of the Act does not confer power on the Minister to make regulations to delegate it to the Controller with the power to waive or modify the prescribed statutory Form H. The learned judge then held that reg 11(3) which purportedly gives power to the Controller is null and void and ultra vires the Act as it has gone past the limit prescribed under the Act. The learned judge also appeared to take the position that the powers under s 24 of the Act must be exercised by the Minister alone as there was no provision in the Act which allowed the Minister to delegate such power to the Controller.

[17] In our assessment, reg 11(3) is not ultra vires the Act as it was a provision designed to regulate and control the terms of the SPA as envisaged by s 24(2)(e) of the Act. The argument that only the Minister has the power to modify or waive the statutory form contract is without merit as s 4 of the Act

A provides that the Controller may exercise any of the powers by or under this Act. It must follow, in our view, that the Controller has the power to exercise his discretion as granted under reg 11(3).

B **[18]** In this context, it is noteworthy that the Controller has wide powers under the Act. There is therefore no justification that the power to modify or waive the contract must be exercised only by the Minister and cannot be delegated to the Controller. It is also significant that the SPAs between the developer and the purchasers and the terms contained therein are derived from the form prescribed in Schedule H which is to be found in the Regulations 1989 and not in the Act. It can therefore be reasonably inferred that the power granted to the Minister was intended to be delegable. Having said that, we are constrained to note that it would have been desirable for such powers to be provided in the Act itself so as to better protect and preserve the interest of the purchasers. That, in the end, is a matter for Parliament to decide.

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[19] In the circumstances, we are unable to agree with the decision of the learned judge. We are, for the reasons given, constrained to hold that the learned judge was plainly wrong in holding that reg 11(3) was ultra vires the Act.

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WHETHER THE LETTER OF 17 NOVEMBER 2015 WAS INVALID AND OF NO EFFECT

F **[20]** The next issue concerns the validity of the letter of 17 November 2015. In this respect, the developer had first applied to the Controller by letter dated 20 October 2014 for an extension of time to complete the project. This was rejected by the Controller. The developer then wrote to the Minister seeking for the same extension. This was followed by the impugned letter of 17 November 2015 in which an extension of 12 months was granted to complete the project.

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[21] We note that this letter of 17 November 2015 was signed by one Jayaseelan a/l K Navaratnam on behalf of the Controller. There is no indication from the face of the letter that this decision was conveyed on behalf of the Minister or that the signatory of the letter was acting on the authority of the Minister. In fact, the letter stated that that it was the 'Kementerian' (Ministry) which had taken the decision. To muddy the waters further, the letter indicated that the decision was made pursuant to reg 11 instead of reg 12.

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[22] The impression gained from considering the whole of the letter is that the appeal from the decision of the Controller was decided by the Controller himself which, to put it mildly, was wholly untenable. Under reg 12, any person aggrieved with the decision of the Controller under reg 11(3) can appeal

to the Minister and the decision of the Minister is final and shall not be questioned in any court. Since the Minster did not file any affidavit to provide some clarity, the contention that the Minister was not the one who made the decision has merit and cannot be dismissed lightly.

[23] We are therefore of the view that the order as contained in the letter of 17 November 2015 was made without jurisdiction and ultra vires the Act. Accordingly, we hold that the order in the said letter is a nullity and of no effect.

WHETHER THE PURCHASERS WERE ENTITLED TO A RIGHT TO BE HEARD

[24] The final issue raised before us in arguments was whether the purchasers ought to have been given a right of hearing prior to the decision made by the Controller and/or Minister. In this respect, we note that the purpose of the Act was to protect the interest of the purchasers. As the rights of the purchasers to claim damages in the event of delay would be adversely affected or even extinguished, we agree that the purchasers must be given an opportunity to be heard prior to any decision made.

[25] As the purchasers comprise a group which can easily be ascertained, they should at least be notified of the developer's application for any extension of time to complete the project and be given a reasonable period of time to state their views before any such decision is taken. As no such right to be heard was afforded to the purchasers, it is our judgment that the decision made in this case, whether by the Controller or Minister, was null and void and of no effect and should accordingly be set aside.

[26] In this regard, the law reports are replete with cases on the law pertaining to the right to be heard where an individual is affected by an administrative decision. The jurisprudence in this context is well-settled. We only need to refer to two cases. In the first case, *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152, the Federal Court held that the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is affected by an administrative action, no matter whether it is labelled 'judicial', 'quasi-judicial' or 'administrative' or whether or not the enabling statute makes provision for a hearing. In speaking for the Federal Court, Raja Azlan Shah FJ (as His Royal Highness then was) observed at p 154: '... In particular, the silence of the statute affords no argument for excluding the rule, for the justice of the common law will supply the omission of the legislature ...'.

[27] In the next case, *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2018] 2 MLJ 590;

A [2017] 4 CLJ 265, the Federal Court was confronted with the following question of law:

> In considering an application for registration of a trade union in respect of a particular establishment, is there a statutory requirement on the part of the Director-General under section 12 of the Trade Unions Act 1959 to consult with any existing trade union representing workman in that establishment, trade, occupation or industry.

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[28] In an instructive judgment, Balia Yusuf Wahi JCA (now FCJ) in C speaking for the Federal Court observed as follows:

> [72] Lest we forget, natural justice is a universal concept and must be observed at all levels especially when an individual or a body having power to determine questions affecting the rights of other individuals. We say not only common sense dictates that the views of NUBE ought to be considered but it is also implied that the principles D of natural justice (in this case the right to be consulted) must be observed. The position of the DG in this case may be likened to that of the Minister in *Attorney-General v Thomas D'arcy Ryan* [1980] AC 718 where the Privy Council observed:
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> E > ... the minister was a person having legal authority to determine a question affecting the rights of individuals. This being so, it is a *necessary implication* that he is required to observe the principles of natural justice when exercising that authority; and if he fails to do so, his purported decision is a nullity. (Emphasis added.)
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> F [73] Authorities are in abundance to support the view that the courts will imply into the statutory provision a rule that the principle of natural justice should be applied. Lord Guest in *Wiseman & Anor v Borneman & Ors* [1971] AC 297 (House of Lords) had reiterated that 'This implication will be made on the basis that Parliament is not to be presumed to take away parties' right without giving them an G opportunity of being heard in their interest. In other words, Parliament is not presumed to act unfairly'. In that case, the dictum of Byles J in *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180 was quoted as a clear proposition to this effect and which has been followed in many subsequent cases in England.

H **[29]** There also appeared to be some suggestion by the learned SFC that the Minister had an absolute or unfettered discretion in exercising his powers under the 1989 Regulations. This argument was no doubt inspired by reg 12 of the 1989 Regulations which provided that the decision of the Minister shall be final and shall not be questioned in any court. With respect, we must at once I observe that any such proposition is misconceived in law as it offends the fundamental principle that every legal power must have legal limits (see *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135). Implicit in this principle is that every administrative exercise of discretion must be made in accordance with law. If such exercise of

discretion is not according to law, the courts have the jurisdiction and indeed the duty to set aside such decision.

[30] We should also reiterate lest it be misunderstood that no government or public authority is above the law. Their powers are circumscribed by law. It must follow that no government or public authority can have absolute or unfettered discretion in carrying out its functions. There is nothing novel about this proposition as it stems from principles consonant with a constitutional democracy and the rule of law. We might add that absolute or unfettered discretion can be likened to an unruly animal which, if unleashed from its cage, will be hard to control. For this reason, the courts must have the power to strike down administrative decisions which are not according to law or made in excess of the power provided by law.

[31] In the present context, we would accordingly surmise that the Minister, who was entrusted with the discretionary power under the 1989 Regulations, must act fairly. In our view, it does not matter whether the discretionary power to be exercised was judicial in nature, or quasi-judicial or even a purely administrative one. As the rights of the purchasers to claim damages in the event of delay would be adversely affected or even extinguished by the exercise of such discretionary power, it is our judgment that the purchasers must be given an opportunity to be heard prior to any decision made. Since no such right was afforded, the decision of the Minister cannot stand and must be set aside.

CONCLUSION

[32] In the result, we allow the appeal and set aside the order of the learned judge which declared that reg 11(3) is ultra vires the Act. We however affirm the order of the learned judge that the decision stated in the letter of 17 November 2015 is null and void for the reasons we have provided which reasons are different from the ones given by the High Court. As agreed by the parties, there will be no order as to costs.

Order accordingly.

Reported by Ashok Kumar